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No. 93-804

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDSEY, STEPHENSON & LINDSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a non-recourse secured note creates a "debt" for purposes of 11 U.S.C. 101(12) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 995 F.2d 626. The opinion of the district court (Pet. App. 9a-13a) is reported at 158 B.R. 75. The opinion of the bankruptcy court (App., *infra*, 1a-2a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. A petition for rehearing was denied on August 23, 1993. Pet. App. 16a. The petition for a writ of

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[1] The petition states (Pet. 1) that the opinion of the bankruptcy court appears at Pet. App. 14a-15a, but those pages are not included in the copies of the petition served on the government.

certiorari was filed on November 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a partnership composed of four individuals (two solely as individuals and two both as individuals and as officers of estates). On September 16, 1985, the four individuals who are partners executed a promissory note payable to Panhandle Bank & Trust Company in the original principal amount of $1,069,612.17. Payment of the note was secured by real and personal property owned by petitioner in Hutchinson, Randall, and Deaf Smith Counties in the State of Texas. The note also contained what is commonly referred to as a nonrecourse provision, which stated that the makers of the note "shall not be personally liable for the payment of the principal [and interest] evidenced by this Note * * *, it being understood that the payee shall look only to the collateral [as provided in certain other documents executed on the same day]." When the bank failed in 1986, the Federal Deposit Insurance Corporation (FDIC) acquired the note in its corporate capacity by means of a purchase and assumption transaction conducted pursuant to 12 U.S.C. 1823(c)(2)(A) (1988). See Pet. App. 2a-3a; FDIC C.A. Br. 4-5; FDIC C.A. App. A108-A109.

2. In December, 1990, petitioner filed a petition seeking relief under Chapter 12 of the Bankruptcy Code, 11 U.S.C. 1201-1231. The FDIC filed a motion urging that the case be dismissed, arguing that petitioner was ineligible for relief under Chapter 12 because it had aggregate debts of more than $1,500,000, the maximum permitted for a Chapter 12 debtor under Sections 109(f) and

101(18).[2] The parties stipulated that the balance due on the note at that time exceeded $1,500,000, but petitioner argued that it did not represent a "debt" for purposes of the aggregate debt limitation. The bankruptcy judge granted the FDIC's motion, stating that "[t]he court finds that the nonrecourse debt must be counted for these purposes." App., *infra*, 2a (citing *Johnson* v. *Home State Bank*, 111 S. Ct. 2150 (1991)); see Pet. 3; Pet. App. 3a.

3. The district court affirmed. Pet. App. 9a-13a. The court explained that the nonrecourse note constitutes a "claim against the debtor" under Section 102(2), which defines the term "claim" to include a "claim against property of the debtor." Pet. App. 13a. The court then concluded that the note also must be considered to be a "debt," because this Court had "construed the meaning of the words 'debt' and 'claim' as coextensive." *Ibid.* (citing *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552 (1990)). Since the note constituted a debt, the court concluded that petitioner's aggregate debts exceeded the $1,500,000 limitation and thus affirmed the bankruptcy court's dismissal of petitioner's bankruptcy case.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court first accepted petitioner's concession that the note constituted a "claim." *Id.* at 5a-6a. The court then con-

[2] For convenience, this brief refers to the current version of Title 11 (1988 & Supp. IV 1992) by Section number only. We note that several of the provisions cited in this brief were renumbered in 1990. The definition of "claim," formerly codified at 11 U.S.C. 101(4) (1988), now appears at 11 U.S.C. 101(5) (Supp. IV 1992). Similarly, the definition of "debt" in 11 U.S.C. 101(11) (1988) now appears at 11 U.S.C. 101(12) (Supp. IV 1992), and the definition of "family farmer" in 11 U.S.C. 101(17) (1988) now appears at 11 U.S.C. 101(18) (Supp. IV 1992).

cluded that the note falls within the statutory definition of a debt as "liability on a claim." *Id.* at 6a-8a (quoting Section 101(12)). The court stated that this Court has interpreted "claim" and "debt" as having coextensive meanings. Pet. App. 7a (quoting *Davenport*, 495 U.S. at 558). The court also explained that, aside from this Court's interpretation of the word "debt," the note created "liability on a claim," even if petitioner had no "personal" liability: "'Personal liability' is a subcategory of 'liability.' Although a nonrecourse note stipulates no personal liability, it *does* impose a legal obligation [enforceable by] a remedy in the form of action against the collateral specified for the loan." Pet. App. 8a.

ARGUMENT

Petitioner argues that a nonrecourse secured note does not create a debt for purposes of the definition of "debt" in Section 101(12) of the Code. The contrary conclusion of the court of appeals is correct and does not warrant review by this Court.

1. Section 109(f) of the Bankruptcy Code limits relief under Chapter 12 to debtors who are "family farmer[s]." Section 101(18), in turn, limits the term "family farmer" to individuals and entities "whose aggregate debts do not exceed $1,500,000." Section 101(18)(A), and (B)(ii). Under Section 101(12), a "debt" is "liability on a claim." Finally, under Section 101(5), the term "claim" includes both a "right to payment" and any "right to an equitable remedy for breach of performance."

Petitioner correctly concedes that a secured nonrecourse note constitutes a "claim" for purposes of Section 101(5), because such an instrument creates a right to a remedy against property of the debtor. See Section 102(2) ("'claim against the debtor' includes claim against

property of the debtor").[3] But the reasoning that supports that concession also justifies a conclusion that the instrument creates a "debt." See *Pennsylvania Department of Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990) (referring to "Congress' intent that the meanings of 'debt' and 'claim' be coextensive"). As the court of appeals explained, a non-recourse provision excludes only *personal* liability. The nonrecourse provision in this case did not exclude all liability on the note; rather, it expressly preserved the liability of the collateral. As this Court has recognized in a closely related context, the Bankruptcy Code recognizes the existence of those two separate forms of liability on the part of a debtor. See *Johnson* v. *Home State Bank*, 111 S. Ct. 2150, 2154 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*."). Because the note and related security documents created "liability" on the claim for repayment of the note, the agreements create a "debt" for purposes of the Bankruptcy Code. See *Quintana* v. *Commissioner* (*In re Quintana*), 915 F.2d 513, 516-517 (9th Cir. 1990) (a claim constitutes a "debt" for purposes of the Chapter 12 limitation even if the creditor has no right to enforce the claim against the debtor personally).

2. Contrary to petitioner's contention (Pet. 5), the decision of the court of appeals does not conflict with the

[3] Although the note in this case was executed by petitioner's partners, rather than petitioner itself, under Section 102(2) it plainly constitutes a claim against petitioner. Petitioner does not suggest that the fact that petitioner did not execute the note has any relevance to the question of whether the note creates a "debt" of petitioner.

Sixth Circuit's decision in *Comprehensive Accounting Corporation* v. *Pearson* (*In re Pearson*), 773 F.2d 751 (1985). *Pearson* did not involve a nonrecourse debt, but rather the question of whether a particular debt was "liquidated" even though at the time the petition was filed there was a "substantial dispute regarding liability and amount." *Id.* at 754. That question was relevant because that case was filed under Chapter 13 of the Bankruptcy Code, under which relief is limited to debtors with "noncontingent, liquidated, unsecured debts of less than $100,000." Section 109(e). The analysis of the *Pearson* court thus has no relevance to the question presented by the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION

IN RE:

LINDSEY, STEPHENSON & LINDSEY,
a parternship composed of Tommy Lindsey, Jacquelynn Joy Stephenson and Jo Carol Lindesy, d/b/a Great Plains Land & Cattle,

Debtor

In Proceedings Under Chapter 12 of the Bankruptcy Code Case No. 290-20491-12

[Filed July 1, 1991]

Judgment Relieving the Automatic Stay And Dismissing Chapter 12 Proceedings

On December 31, 1990, Lindsey, Stephenson & Lindsey, a partnership (Debtor) filed for relief under Chapter 12 of the Bankruptcy Code. On February 12, 1991, the Federal Deposit Insurance Corporation as the successor to Panhandle Bank & Trust Company (FDIC) filed a motion to be relieved from the automatic stay, asserting that the Debtor was not eligible for Chapter 12 relief.

In order to be eligible for Chapter 12 relief, a debtor's aggregate debts must not exceed $1,500,000.00. *See* 11 U.S.C. § 109(f) and 11 U.S.C. 101(17)(B). The parties stipulated that if the nonrecourse note held by the FDIC was included in that calculation, the Debtor was not

eligible for Chapter 12 relief. The court finds that the nonrecourse debt must be counted for these purposes. *See Johnson* v. *Home State Bank*, ___ U.S. ___, 59 U.S.L.W. 4609 (1991)

It is therefore ORDERED that:

1. The automatic stay of 11 U.S.C. § 362 is relieved to permit the FDIC to foreclose the liens which is holds.